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IN THE
SUPREME COURT OF THE UNITED STATES

DAVID KING, ET AL.,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF MISSOURI LIBERTY PROJECT AND MISSOURI FORWARD FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

I. Congress Commonly Threatens to Withhold Benefits from States' Citizens to Encourage State Participation in Federal Programs. 6

II. The ACA Reflects Congress's Judgment that State Participation Would Be Critical to the Public Acceptance of the Act. 9

III. Many States Have Rejected State Exchanges After Careful and Informed Political Deliberation. 13

IV. Enforcing the ACA as Written Best Accords with the Institutional Roles of this Court, Congress, and the States in our System of Federalism. 21

A. Enforcing the plain terms of the ACA accords with this Court's limited constitutional role. 21

B. Enforcing the ACA as written accords with Congress's supremacy in legislative matters and respects the compromises of the legislative process. 23

C. Enforcing the ACA as written accords due respect to the States and preserves the results of state political processes..... 26

1. As written, the ACA preserves a more robust role for States to exercise their traditional authority over health care policy..... 26

2. As written, the ACA promotes democratic accountability by conferring authority over health-care reform on democratically responsive state officials..... 28

3. As written, the ACA fosters democratic participation by ordinary citizens in state political processes..... 30

4. Enforcing the ACA as written will preserve the democratic choices resulting from informed state consideration of the exchanges..... 31

CONCLUSION..... 34

TABLE OF AUTHORITIES

Cases: Page

Alaska Dep't of Envtl. Conservation v. *E.P.A.*, 540 U.S. 461 (2004) 4, 26, 32
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Bd. of Govs. of Fed. Res. Sys. v. *Dimension Fin. Corp.*, 474 U.S. 361 (1986) .. 25, 26
Bond v. *United States*, 131 S. Ct. 2355 (2011) 27
Davis v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) 29
Exxon Mobil Corp. v. *Allapattah Servs.*, 545 U.S. 546 (2005) 24
FERC v. *Mississippi*, 456 U.S. 742 (1982) 30
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Halbig v. *Burwell*, 758 F.3d 390 (D.C. Cir. 2014) ..... *passim*
Indiana v. *Internal Revenue Serv.*, Case No. 1:13-cv-01612 (S.D. Ind.) 18
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Massachusetts v. *Mellon*, 262 U.S. 447 (1923) 5
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New York v. *United States*, 505 U. S. 144 (1992) 21, 28, 29, 32
Pegram v. *Herdrich*, 530 U.S. 211 (2000) 27
Printz v. *United States*, 521 U.S. 898 (1997) 27

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Schaffer v. *Weast*, 546 U.S. 49 (2005) 8
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United States v. *Locke*, 471 U.S. 84 (1985) 24
United States v. *Lopez*, 514 U.S. 549 (1995) 12, 28
W. Va. Univ. Hosps. v. *Casey*, 499 U.S. 83 (1991) .. 22

Statutes:

20 U.S.C. § 1412 8
20 U.S.C. § 6301 8
20 U.S.C. § 6311 8
26 U.S.C. § 36 6
26 U.S.C. § 3302 8
26 U.S.C. §§ 3301-3311 8
42 U.S.C. § 601 7
42 U.S.C. § 602 7
Mo. Rev. Stat. § 376.1186.1 14
N.H. Stat. § 420-N:7 15

Other Authorities:

155 CONG. REC. S13853 (Dec. 23, 2009) 12
155 CONG. REC. S13862 (Dec. 23, 2009) 11, 12

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THE FEDERALIST NO. 45 (J. Madison) 27
THE FEDERALIST No. 79 (A. Hamilton) 23

Legislation:

Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. 7

INTEREST OF *AMICI CURIAE*

Founded by constitutional lawyers and law professors Joshua D. Hawley and Erin Morrow Hawley, Missouri Liberty Project and Missouri Forward Foundation are nonprofit organizations dedicated to promoting constitutional liberty and limited government. As part of their mission, the Project and Foundation seek to give ordinary Missourians a meaningful voice in government. Following adoption of the Patient Protection and Affordable Care Act ("ACA" or "Act"), Missouri citizens elected by statewide ballot to prohibit the establishment of a state-based exchange under the Act. The IRS rule at issue here, however, effectively nullifies this decision by Missouri voters. As a voice for Missourians, the Project and Foundation have an important interest in seeing that a federal regulation that exceeds the Executive Branch's statutory authority does not override the deliberative choices of Missouri citizens.[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* represent that, in consultation with *amici*, they authored this brief in its entirety and that none of the parties or their counsel, nor any person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The ACA is a cooperative-federalism statute that insists on state participation for the operation of some of its provisions. It reflects Congress's judgment that the engagement of state voters and political actors would be essential to the public acceptance of the Act. The Act therefore gives the States powerful incentives to set up state exchanges. After careful consideration, however, many state voters have deliberately rejected state exchanges with their attendant benefits. The voters of Missouri, for example, voted by referendum not to establish a state healthcare exchange. This Court should respect the outcome of these state political judgments and enforce the ACA as written.

By its plain terms, the ACA gives the States the choice of establishing state-based healthcare exchanges. The Act incentivizes state participation by providing tax benefits for citizens living in States that choose to set up exchanges. Contrary to the Government, this assortment of choices and incentives is hardly "inconceivable," "unfathomable," or in any way unprecedented. It is, in fact, entirely familiar. Congress routinely attempts to incentivize state participation in federal social-welfare programs by promising benefits or withholding incentives.

There is particular reason to think that this was Congress's purpose here. The ACA passed Congress by the narrowest of margins, in the face of concerted political opposition. Under these circumstances, it is not surprising that Congress viewed the active involvement of the States in implementing the ACA

as essential to securing public acceptance of the Act. State political actors have distinct advantages over federal agencies in promoting public acceptance of new social-welfare programs. Among other things, they are closer to the voters and better able to respond to public concerns. Congress is keenly aware of these advantages, and it has come to view the States as indispensable partners in the administration of social-welfare legislation. The plain terms of the ACA reflect its framers' decision to give state voters and political actors compelling incentives to participate in the ACA's implementation. The plain terms of the ACA also allow state citizens to choose *not* to participate.

After the ACA's enactment, state voters and political actors engaged in careful, thoughtful, and well-informed consideration of whether to establish state exchanges. For example, an overwhelming majority of Missouri voters rejected a state exchange by enacting through referendum a statute that forbids the Governor to establish a state exchange. In Missouri and elsewhere, such debates have been marked by public awareness that tax subsidies may not be available on the federal exchanges. Notwithstanding this eventuality, numerous States consciously refused to establish state exchanges, for various reasons. Those reasons include concerns about the unknown future costs of operating the exchanges, opposition to federal encroachment on traditional state regulation of health care, the desire of state employers to avoid the employer mandate, and for some state actors, the desire to pressure the political branches to revisit the ACA.

This Court should interpret the ACA to give full effect to the results of the state deliberation that the statute's plain terms invite. This interpretation best accords with the constitutionally appointed roles of this Court, Congress, and the States—not to mention the statute's plain text. Giving effect to the statute as written will best preserve this Court's role as the faithful interpreter of Congress's enactments, and adhere to this Court's traditional refusal to second-guess Congress's political judgments. This interpretation will also accord with Congress's supremacy in enacting legislation: It will give effect to the vigorously negotiated compromise that emerged from the legislative process. Congress, not this Court, has both the authority and the responsibility to "correct" any perceived shortcomings of the ACA as written.

Further, enforcing the ACA as written will best safeguard the traditional role of the States in our system of federalism. The Government's atextual reading "conflicts with the express language of the [ACA] . . . and with principles that preserve the integrity of States in our federal system." *Alaska Dep't of Envtl. Conservation* v. *E.P.A.*, 540 U.S. 461, 502 (2004) (Kennedy, J., dissenting). Enforcing the statute as written will preserve the States' historic role as primary regulators of health care. It will promote political accountability by ensuring that key decisions about health care are made by political actors who are more responsive to the citizens than are federal bureaucrats. It will enhance the opportunity of citizens for democratic deliberation. Above all, it will protect individual liberty.

Considering the ACA, a plurality of this Court once remarked: "In the typical case [of federal spending legislation] we look to the States to defend their prerogatives by adopting 'the simple expedient of not yielding' to federal blandishments when they do not want to embrace the federal policies as their own. The States are separate and independent sovereigns. Sometimes they have to act like it." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius* ("*NFIB*"), 132 S. Ct. 2566, 2603 (2012) (opinion of Roberts, C.J.) (internal citation omitted) (quoting *Massachusetts* v. *Mellon*, 262 U.S. 447, 482 (1923)). By largely rejecting the state exchanges, the States have "act[ed] like it." *Id.* They have "adopt[ed] the simple expedient of not yielding to federal blandishments when they [did] not want to embrace the federal policies as their own." *Id.* (quotation omitted). On the Government's view, their decisions were meaningless. This Court should correct that misimpression.

ARGUMENT

The ACA is a cooperative-federalism statute whose plain language reflects Congress's political judgment that the participation of state actors would be critical to the statute's public acceptance. Congress routinely incentivizes States to participate in federal social-welfare programs, and there is good reason to believe that Congress did the same here. The ACA passed Congress by the narrowest of margins and in the face of concerted political opposition. Under these circumstances, it is not surprising that Congress viewed State cooperation in the Act's programs as critical to the Act's future. Accordingly, the ACA invites the States to set up the exchanges on which health insurance is to be bought and sold. While the Act does not require state cooperation, it generously incentivizes state involvement. Many States, however, declined the offer, including the voters of Missouri. This Court should respect the political decisions of state voters and their elected representatives and enforce the ACA as written.

I. Congress Commonly Threatens to Withhold Benefits from States' Citizens to Encourage State Participation in Federal Programs.

The plain terms of the ACA threaten to withhold an important federal benefit—namely, tax subsidies—from the citizens of States that do not establish a state exchange. *See* 26 U.S.C. § 36B(b)(2)(A), (c)(2)(A)(i). The Government argues that it is inconceivable that Congress intended this threat to withhold federal benefits as an incentive to

the States to establish exchanges. Gov't Br. in Opp. to Pet. For Certiorari, at 27 ("No sound approach to statutory interpretation would attribute to Congress the intent to create such a self-annihilating scheme."); *see also Halbig* v. *Burwell*, 758 F.3d 390, 413 (D.C. Cir. 2014) (Edwards, J., dissenting). On the contrary, federal legislation routinely threatens to withhold federal benefits from citizens of States that do not cooperate in the administration of the legislation—even when withholding such benefits would significantly impede the achievement of the law's central purposes.

Instances of this tactic abound. For example, the Federal Temporary Assistance for Needy Families ("TANF") program provides block grants to States to establish subsistence-welfare programs, but only if the States comply with numerous requirements in structuring those programs. *See* 42 U.S.C. § 602; *King* v. *Smith*, 392 U.S. 309, 316-17 (1968) (describing the similar structure of TANF's predecessor, AFDC). If States opt not to comply with those requirements, the federal government denies all TANF funding to the State, even though that denial would undermine TANF's aims of supporting families and ending welfare dependency. *See* 42 U.S.C. § 601; *see generally* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

Similarly, the Individuals with Disabilities Education Act ("IDEA") provides funding for local schools to educate children with disabilities, but it withholds funding from States that do not comply with an extensive list of federal statutory

requirements. *See* 20 U.S.C. § 1412(a); *Schaffer* v. *Weast*, 546 U.S. 49, 52 (2005). Likewise, the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311, grants federal tax credits for taxpayer contributions to State unemployment funds, but it denies those benefits to taxpayers whose States' unemployment-compensation laws do not comply with a number of federal requirements. *See* 26 U.S.C. §§ 3302(a)(1), 3304. In the same vein, the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 ("NCLB"), conditions federal education grants on States' compliance with numerous statutory requirements. *See, e.g.*, 20 U.S.C. § 6311(a), (b). Denying NCLB funds to non-compliant States would plainly defeat NCLB's goals of providing children in those States "a fair, equal, and significant opportunity to obtain a high-quality education." 20 U.S.C. § 6301.

In short, like nearly every other regime of cooperative federalism, the ACA conditions the receipt of an important federal benefit by a State's citizens on the State's agreement to cooperate in the administration of the ACA's federal-benefit program. There is nothing "fanciful" about it. *Halbig*, 758 F.3d at 413, 414, 420, 425 (Edwards, J., dissenting). Rather, such incentives reflect a common, even preferred, tactic of the framers of federal social-welfare legislation.

II. The ACA Reflects Congress's Judgment that State Participation Would Be Critical to the Public Acceptance of the Act.

Congress determined that state involvement would be important to public acceptance of the ACA and accordingly offered the States significant incentives to participate. These incentives are commonplace. The federal government has long since come to see the States as indispensable partners in the administration of federal social-welfare legislation. Indeed, given the vocal and highly organized political opposition to the ACA's passage, Congress very rationally could have concluded—and evidently did conclude—that the voluntary engagement of state voters, officials, and agencies would be essential to the successful implementation of the Act. Accordingly, the ACA provides the States compelling incentives to cooperate in the administration of the exchanges.

There is no doubt that Congress is keenly aware of the advantages of employing state political actors to implement federal welfare legislation and thereby promote its acceptance. Implementation of federal legislation by state actors "offers a means for deeper entrenchment of federal statutory norms through a broader web of state and local implementers than does federal implementation alone." Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 565 (2011). "[D]ecentralizing implementation typically presses into service not only state agencies but also state legislators and executives (governors,

commissioners, attorneys general, and so on), and does so in a way that is far more direct than the initial role played by Congress and the President in federal statutory implementation." *Id.* at 570. Congress deliberately employs state implementation as a "*strategic* tool, . . . a nationalizing mechanism utilized by Congress to facilitate its takeover of a new field." *Id.* at 543. Federal policymakers are aware that the use of the States tends to promote public acceptance of new federal programs, since "there are potentially important, and sometimes public, moments of deliberation about the new federal statute—moments that . . . certainly are closer to 'the people' simply because they happen at a local level." *Id.* at 571-72.

Congress had maximal reason to be concerned about the public acceptance of the ACA, given the high-profile political and public opposition to its passage. The ACA is an ambitious public-welfare program designed to reshape the Nation's health-care system. The ACA faced significant barriers to passage, including vigorous political opposition in Congress and organized public resistance. Facing these political realities, it is not surprising that "Congress chose . . . to preserve a central role for private insurers and state governments," *NFIB*, 132 S. Ct. at 2609 (Ginsburg, J., concurring in part and dissenting in part), in an attempt to achieve broad public acceptance for the ACA.

In fact, "we have evidence from the ACA's legislative history that the choice between state and federal implementation was critical to the statute's passage." Gluck, 121 YALE L.J. at 578. "[T]he

question of state/federal implementation was *the key question* that divided the House and Senate versions of the legislation." *Id.* Because the election of Senator Scott Brown to replace Senator Edward Kennedy deprived the ACA's supporters of the 60th vote for passage in the Senate, the bill had to be passed through the reconciliation process, which meant that only the previously-passed Senate version could be enacted. *See id.* at 578 n.118. For that reason, "[g]iving the states the leadership role [in implementation] was the concession ultimately required to close the deal." *Id.* at 578.

The congressional debate over the States' role focused specifically on the establishment and implementation of the state exchanges: "[T]he major point of contention between the House and Senate versions of the bill was whether the states or the federal government would run the new insurance exchanges." *Id.* at 575. Supporters of state-run exchanges argued that such exchanges would directly promote public acceptance of the Act: "[A]s a matter of how individual Americans encounter the health insurance system—as an expressive and informal matter—a nationally operated system of insurance purchasing would convey something very different about the allocation of state and federal power in this area." *Id.*

Multiple Members of Congress expressly recognized that engaging the States would be critical to effective implementation of the ACA. For example, Senator Maria Cantwell stated that "[m]any States in our country have been the most cost-effective tools for delivering new and efficient

health care models, while we at the federal level still struggle to try to drive these policies." 155 CONG. REC. S13862 (Dec. 23, 2009) (statement of Sen. Cantwell). She publicly urged the Senate to "[l]et States do what they have done best for the last several decades; that is, innovate . . . ." *Id.* Similarly, Senator Ron Wyden pointed to health-reform proposals in Oregon and Vermont as he praised ACA provisions that would permit States "to tailor health reform to best meet the needs of their citizens." 155 CONG. REC. S13853 (Dec. 23, 2009) (statement of Sen. Wyden).

The States long have played a central role in experimenting with innovative public-policy solutions. *See United States* v. *Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). The ACA reflects a congressional judgment that engaging the States offered the best opportunity for successful implementation and public acceptance. In order to ensure this essential state engagement, the ACA employed the strongest incentive that Congress could muster.

The history of the ACA's passage, therefore, directly contradicts the assertion that "[i]t is inconceivable that Congress intended to give States the power to cause the ACA to 'crumble.'" *Halbig*, 758 F.3d at 413 (Edwards, J., dissenting); *see also id.* at 420 ("It is unfathomable that Congress intended to allow States to effectively nullify the individual mandate . . . ."). To the contrary, the plain terms of the ACA indicate that Congress viewed state cooperation as so essential to the public acceptance of the ACA that Congress consciously chose to offer

powerful incentives for compliance, and equally powerful disincentives for non-compliance.

III. Many States Have Rejected State Exchanges After Careful and Informed Political Deliberation.

As the plain text of the Act envisions, the ACA's passage prompted thorough public debate by state voters and political actors on the issue whether to establish state exchanges. Ultimately, after much deliberation, more than thirty States declined to establish state exchanges, notwithstanding the powerful incentives to do so. Many of these States rejected exchanges with the understanding that doing so might deprive their citizens of tax subsidies; indeed, some States did so *for the express purpose* of avoiding the tax subsidies and their statutory effects.

For example, in Missouri, the Missouri General Assembly was initially poised to create a state exchange in 2011. The Republican-dominated House of Representatives passed a bill to create a state exchange by a vote of 157-0. *See* JOURNAL OF THE MISSOURI HOUSE OF REPRESENTATIVES, April 14, 2011, at 127, *available at* http://www.house.mo.gov/billtracking/bills111/jrnpdf/jrn055.pdf.[2] In the Senate, however, the bill stalled due to opposition by Senators who believed that the bill gave the federal government too much control over the exchange. *See Missouri's Effort to Create Health Insurance Exchange Falls Short in First*

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[2] All internet sources were last visited December 23, 2014.

Attempt, HEALTH CARE FOUNDATION OF GREATER KANSAS CITY, June 8, 2011, *available at* http://hcfgkc.org/news/missouris-effort-create-health-insurance-exchange-falls-short-first-attempt. Opponents indicated that they could support the creation of a state-based exchange, but only with greater privacy protections and strengthening of Missouri's control over the exchange. *Id.*

Subsequently, in 2012, the Missouri General Assembly presented the issue of the creation of Missouri's exchange to the voters of Missouri. Specifically, the General Assembly submitted for voter referendum the question whether Missouri law should be amended to provide that "[n]o state-based health benefit exchange may be established, created, or operated within this state in order to implement Section 1311 of the federal health care act, 42 U.S.C. Section 18031," unless authorized by the referendum or by the General Assembly; and that "[i]n no case shall the authority for establishing, administering, or operating a state-based health benefit exchange in Missouri be based upon an executive order issued by the governor of Missouri." Mo. Rev. Stat. § 376.1186.1, 2. In November 2012, this referendum was approved by 61.7 percent of Missouri voters, or 1.573 million votes out of 2.549 million cast. Nov. 6, 2012 General Election Results, Missouri Secretary of State, *available at* http://enrarchives.sos.mo.gov/enrnet/default.aspx?eid=750002497. This referendum effectively halted any effort to set up an exchange in Missouri and barred Missouri's Governor from creating an exchange by executive order.

Missouri's referendum occurred amid public awareness that failure to establish a state exchange could result in the unavailability of tax subsidies for purchasing insurance in the state. *See, e.g.*, Christie Herrera, Op-Ed, *Kudos to Missouri Senate for Blocking Health Exchange*, SOUTHEAST MISSOURIAN (March 18, 2012), *available at* http://www.semissourian.com/story/1826974.html (op-ed approving the blocking of the state exchange while noting that the ACA does not "offer subsidies to people buying insurance in the federal exchange"); Ambiguity in Affordable Care Act could impact Missourians, MIZZOU WEEKLY (Nov. 15, 2012), *available at* http://mizzouweekly.missouri.edu/archive/2012/34-13/health-care-/index.php (asserting that the outcome of Missouri's referendum "put $2.2 billion in federal health insurance subsidies for low-income Missourians at risk").

Other States have similarly elected not to create state exchanges following democratic deliberation. And like Missouri, many of these states did so with the understanding that failing to create an exchange could mean the loss of federal incentives. For example, in 2012, the New Hampshire legislature enacted a statute providing that "[n]o New Hampshire state agency, department, or political subdivision shall plan, create, participate in or enable a state-based exchange for health insurance under the [ACA], or contract with any private entity to do so." N.H. Stat. § 420-N:7(I) (June 18, 2012). The same statute provides that "[s]tate agencies or departments may interact with the federal government with respect to the creation of a

federally-facilitated exchange for New Hampshire." N.H. Stat. § 420-N:7(II). Proponents of the New Hampshire bill expressly acknowledged that declining to establish a state exchange meant foregoing federal subsidies. Proponents recognized that the ACA "lacks authorization for the federal government to offer subsidies through the [federal] exchanges, making state-level creation of the exchanges all the more essential for [the ACA] to work." New Hampshire Health Insurance Exchange Ban Headed to Gov. Lynch (June 16, 2012), *at* http://news.heartland.org/newspaper-article/2012/06/16/new-hampshire-health-insurance-exchange-ban-headed-gov-lynch. But they contended that, in the long run, "the state would have little say in how the [state] exchange is run, but New Hampshire taxpayers would be forced to pick up the tab." *Id.*

In 2012, New Jersey Governor Chris Christie vetoed a bill that would have established a state exchange in that state. Kate Zernike, *Christie Vetoes Health Insurance Exchange*, N.Y. TIMES (May 10, 2012), *available at* http://www.nytimes.com/2012/05/11/nyregion/christie-vetoes-health-insurance-exchange-for-new-jersey.html?_r=1&. Proponents of the New Jersey exchange pointed out that the state exchange would have "allowed people to apply for tax credits or other subsidies toward the cost of insurance." *Id.* The bill's proponents also argued that "the governor's veto would leave the state scrambling to comply with the federal law and could jeopardize future grant money." *Id.* Notwithstanding these concerns, Governor Christie vetoed the bill because "he was

concerned about the potential costs of the exchange." *Id.*

Similarly, in Maine, Governor Paul R. LePage vetoed a bill to create a state exchange in 2014. Summary of LD 1345, State of Maine Legislature, *available at* http://legislature.maine.gov/LawMakerWeb/summary.asp?paper=HP0962&SessionID=10. In a previous letter to HHS, he had advised that Maine would not set up a state exchange, for reasons typical of the opponents of such exchanges: "[E]ven a state-based health insurance exchange is actually controlled by the federal government. In the end, a state exchange puts the burden onto the states and the expense onto our taxpayers without giving the state the authority and flexibility we must have to best meet the needs of the people of Maine." Maine Issues Letter to Federal Health Officials Opting Out of Health Insurance Exchanges, MAINE.GOV (Nov. 16, 2012), *available at* http://content.govdelivery.com/bulletins/gd/MEGOV-5cfe96. Recent reports indicate that Governor LePage's opposition was additionally motivated by the desire to deprive Maine's citizens of the tax subsidies in order to force Congress to revisit the ACA. *See* Steve Mistler, *Outspoken Critic of Obamacare Helped to Turn LePage against State Exchange*, PORTLAND PRESS HERALD (Nov. 23, 2014), *available at* http://www.pressherald.com/2014/11/23/outspoken-critic-of-obamacare-helped-to-turn-lepage-against-state-exchange/.

For some States, the major point of declining to establish a state exchange was to prevent the availability of federal subsidies in the state. Indiana is one example. Political officials there declined to create a state-based exchange precisely to prevent the availability of tax subsidies. In November 2012, Governor-Elect Mike Pence wrote to Governor Mitch Daniels that Pence opposed creating a state-based exchange in part because "there are legal uncertainties [about the ACA] such as whether the employer tax penalty even applies to businesses in the absence of a state-based exchange." Nov. 15, 2012 Letter from Mike Pence to Mitch Daniels, *available at* http://www.in.gov/aca/files/November_15_Pence_Letter.pdf. As an employer, the State of Indiana did not want to be subject to the employer mandate. In a lawsuit that it filed in October 2013 challenging the IRS rule permitting subsidies in the federal exchanges, the State of Indiana explained that Pence's views caused Gov. Daniels not to create a state-based exchange. *See* Complaint for Declaratory and Injunctive Relief and Judicial Estoppel, *Indiana* v. *Internal Revenue Serv.*, Case No. 1:13-cv-01612 (S.D. Ind.), Doc. No. 1, ¶ 87. In its lawsuit, Indiana expressly seeks a declaration that the IRS rule is invalid because Indiana does not wish to be subject to the ACA's employer mandate. *Id.* at 48.

Similarly, Oklahoma opted not to establish a state-based exchange in order to prevent the availability of tax subsidies and, in turn, avoid the application of the employer mandate. As the State explained in litigation parallel to this case,

"Oklahoma has exercised its right not to establish an Exchange . . . . At present and for the foreseeable future, the State of Oklahoma has decided that the better alternative under the [ACA] for the people of the State of Oklahoma is to preserve a competitive advantage in the area of job growth over States where [employer-mandate] liabilities can be triggered against employers." Amended Complaint for Declaratory and Injunctive Relief, *Pruitt* v. *Sebelius*, Case No. 6:11-cv-00030 (E.D. Okla.), Doc. No. 35, at ¶ 34. Like Indiana, Oklahoma has declined to establish a state-based exchange and seeks a declaration that the IRS rule is invalid. *Id.* at 21-22.

Many of the States that did establish state-based exchanges also weighed the availability of tax subsidies. For example, Idaho established a state exchange after the State's Health Insurance Exchange Working Group—appointed by the Governor and chaired by the State Insurance Director—expressed concern that a failure to do so would deprive Idaho citizens of the ACA's tax subsidies. *See* Health Insurance Exchange Working Group Findings, October 30, 2012, *available at* http://www.doi.idaho.gov/HealthExchange/Final_report.pdf, at 12 ("Some feel that . . . the APTC (subsidy) money from the federal government may not be available with [a federally created exchange]"); *id.* at 48 ("There has been much talk about that idea that federal subsidies would not be available in a federal exchange. There may have to be a lawsuit to make decide [*sic*] this issue.").

State deliberation over the exchanges included debate on other issues as well, not least the question of federalism. Opponents of state exchanges repeatedly expressed concerns about loss of state control, federal encroachment on traditional state regulation of health care, and the prospect of substantial future costs in running the state exchanges. Raising a typical concern, West Virginia officials cited "exorbitant information technology costs" and "the fiscal burden on consumers, industry and the state" in refusing to establish a state exchange. Eric Eyre, W.Va. and Feds to share health insurance exchange, CHARLESTON GAZETTE (Dec. 10, 2012), *available at* http://www.wvgazette.com/News/201212100096.

In sum, the state political processes in over thirty States—including the State of Missouri—reflect the conscious decision to reject state-based exchanges. These decisions were made with knowledge—a d, in some cases, the *intention*—that the failure to establish a state exchange could deprive the State's citizens of tax subsidies. The assertion that "[n]o State even suggested that a lack of subsidies factored into its decision whether to create its own Exchange," *Halbig*, 758 F.3d at 425 (Edwards, J., dissenting), is simply not true.

This Court should favor the interpretation of the ACA that respects the results of these democratic processes. "Democracy does not presume that some subjects are either too divisive or too profound for public debate." *Schuette* v. *Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014) (plurality opinion). On the contrary, "[i]t is

demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds." *Id.* at 1637.

IV. Enforcing the ACA as Written Best Accords with the Institutional Roles of this Court, Congress, and the States in our System of Federalism.

Enforcing the ACA according to its plain terms best preserves the institutional roles of this Court, Congress, and the States. The Government's atextual interpretation, by contrast, would effectively nullify the considered political judgment of numerous state actors. In this Court's jurisprudence, that result is highly disfavored. For as this Court has said time and again, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *NFIB*, 132 S. Ct. at 2578 (Roberts, C.J.) (quoting *New York* v. *United States*, 505 U. S. 144, 181 (1992) (Roberts, C.J.).

A. Enforcing the plain terms of the ACA accords with this Court's limited constitutional role.

First, enforcing the ACA as written accords with this Court's limited role in the interpretation and enforcement of federal statutes. The Government, in effect, asks this Court to "correct" the judgment of the statute's framers about how to address the political resistance to Act's implementation. "This argument profoundly mistakes [this Court's] role." *W. Va. Univ. Hosps.* v. *Casey*, 499 U.S. 83, 100 (1991). "Members of this Court are vested with the

authority to interpret the law; [they] possess neither the expertise nor the prerogative to make policy judgments." *NFIB*, 132 S. Ct. at 2579. Rather than correct Congress's errors, this Court "will not alter the text in order to satisfy the policy preferences of the [Government]. These are battles that should be fought among the political branches . . . ." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

It is particularly important for this Court to adhere to its "limited role" in the context of the ACA. *NFIB*, 132 S. Ct. at 2577. The ACA reflects an extremely complex system of interlocking provisions, rendered more complex by concentrated political opposition and the necessity of political compromise to secure passage. "It is not [this Court's] job to protect the people from the consequences of their political choices." *Id.* at 2579. "Whatever one thinks of the policy decision Congress made [in the ACA], it was Congress' prerogative to make it." *Id.* at 2615 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

This Court's reluctance to rewrite the plain terms of a statute arises, in part, from its recognition that no court has the institutional capacity to determine which elements of a complex statute were necessary to secure its passage. "[D]isregard[ing] the plain language of the statute" in an effort to implement Congress's perceived purposes "creates too great a risk that the Court is exercising its own 'WILL instead of JUDGMENT,' with the consequence of 'substituti[ng] [its own] pleasure to that of the legislative body.'" *Pub. Citizen* v. *Dep't of Justice*, 491 U.S. 440, 471 (1989) (Kennedy, J.,

concurring in the judgment) (brackets in original) (quoting THE FEDERALIST No. 79 (Alexander Hamilton)). Accordingly, "because a statute's apparently odd contours may reflect unknowable compromises or legislators' behind-the-scenes strategic maneuvers, judges can rarely, if ever, tell if a law's specific wording ... was ... crafted to navigate the complex legislative process." John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2395 (2003).

B. Enforcing the ACA as written accords with Congress's supremacy in legislative matters and respects the compromises of the legislative process.

Enforcing the statute's plain terms, moreover, best accords with Congress's constitutional supremacy in legislative matters. To enforce the objective terms of the statute affords due respect to the hard-fought and often unknowable compromises of the legislative process.

This Court has long recognized that deference to Congress's legislative supremacy calls for the enforcement of the objective terms of federal statutes. "Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from 'deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill.'" *Lamie* v. *United States Tr.*, 540 U.S. 526, 538 (2004) (Kennedy, J.) (quoting *United States* v. *Locke*, 471 U.S. 84, 95 (1985)).

The doctrine of legislative supremacy, moreover, prevents this Court from purporting to correct Congress's perceived "errors" and "oversights" in legislative drafting. "If Congress erred, however, it is for that body, and not this Court, to correct its mistake." *Reves* v. *Ernst & Young*, 494 U.S. 56, 63 n.2 (1990). Thus, even if the putative omission of tax subsidies on federal exchanges had been the result of an "unintentional drafting gap"—which it almost certainly was not—nevertheless "it is up to Congress rather than the courts to fix it." *Exxon Mobil Corp.* v. *Allapattah Servs.*, 545 U.S. 546, 565 (2005).

Indeed, enforcing the text as written is particularly appropriate for the ACA, in which the availability of tax subsidies on *only* the state-established exchanges is hardly a drafting lacuna, but rather a deliberate design to address vigorous political opposition to the statute. As explained above, the ACA required a series of well-documented compromises to secure passage. State-controlled exchanges lay at the very heart of these compromises—they were "the concession ultimately required to close the deal." Gluck, 121 YALE L.J. at 578. This Court properly defers to the legislative process when it enforces a provision that is "the result of compromise between groups with marked but divergent interests in the contested provision." *Ragsdale* v. *Wolverine World Wide*, 535 U.S. 81, 93-94 (2002). "Courts and agencies must respect and give effect to these sorts of compromises." *Id.* at 94.

It is indisputable that the ACA's "delicate crafting reflected a compromise amidst highly

interested parties attempting to pull the provisions in different directions." *Barnhart*, 534 U.S. at 461. "As such, a change" to the provisions governing state exchanges "could have unraveled the whole . . . . The deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President are not for [this Court] to judge or second-guess." *Id.*

For these reasons, the Government's contention that subsidies must be made available on the federal exchanges to achieve the "purposes" of the ACA misses the mark. "Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action." *Bd. of Govs. of Fed. Res. Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). In the case of statutes like the ACA, "Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises." *Id.* at 374. The true "intent" of Congress is expressed in the objective terms of the ACA. "Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Id.*

C. Enforcing the ACA as written accords due respect to the States and preserves the results of state political processes.

Perhaps most fundamentally, Petitioners' interpretation of the ACA best accords with the constitutional role of the States and state political processes. It does so in at least four ways: (1) It tends to preserve the historic role of the States as principal regulators of health care and health insurance; (2) it promotes political accountability by ensuring that key decisions are made by political actors more proximate to the people; (3) it enhances the opportunity for citizens, such as the voters of Missouri, to deliberate on the great issues of our day, including health-care reform; and (4) it promotes democratic values by preserving the actual democratic choices of the States. In contrast, the Government's atextual reading "conflicts with the express language of the [ACA] . . . and with principles that preserve the integrity of States in our federal system." *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 502 (Kennedy, J., dissenting).

1. As written, the ACA preserves a more robust role for States to exercise their traditional authority over health care policy.

First, this Court has frequently observed that "the field of health care[] [is] a subject of traditional state regulation." *Pegram* v. *Herdrich*, 530 U.S. 211, 237 (2000); *see also New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (noting that health care is

among the "fields of traditional state regulation"). As this Court has long recognized, protecting traditional enclaves of state authority from federal encroachment protects individual liberty. "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *NFIB*, 132 S. Ct. at 2578 (quoting *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011)).

In this way, "[t[he Framers thus ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy." *NFIB*, 132 S. Ct. at 2578 (quoting THE FEDERALIST No. 45 (James Madison)). Thus the interpretation of the ACA that better promotes "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny from either front." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991). After all, "[p]reservation of the States as independent and autonomous political entities" is an affirmative value in our system of federalism, and it is better served by "requiring [the States] to make policy in certain fields than . . . by reducing them to puppets of a ventriloquist Congress." *Printz* v. *United States*, 521 U.S. 898, 928 (1997) (quotation and brackets omitted).

As written, the ACA provides a robust role for the States in keeping with their traditional influence over health-care policy. The Government's revisionist interpretation, by contrast, denies the States any real say in the Act's implementation. The

Government effectively asks this Court to take "a great step backward in Congress' design to grant States a significant stake in developing and enforcing national [health policy] objectives." *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 516 (Kennedy, J., dissenting). This Court should prefer the plain terms of the statute. Interpretation which hews to these terms "protects us from [the ACA's] best intentions" by "resist[ing] the temptation to concentrate power in one location as an expedient solution to the crisis of the day." *New York*, 505 U.S. at 187.

Over the long run, such an interpretation will best preserve and protect individual liberty—a core concern of the Missouri Liberty Project. "Were the Federal Government to take over the regulation of entire areas of traditional state concern," such as health care regulation, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring). "The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power." *Id.*

2. As written, the ACA promotes democratic accountability by conferring authority over health-care reform on democratically responsive state officials.

Second, the preservation of significant authority at the state level promotes democratic accountability

by ensuring that critical decisions are made by political actors more proximate and more responsive to the citizens. In the States, "the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed." *NFIB*, 132 S. Ct. at 2578. As this Court has noted, "[w]here Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people." *New York*, 505 U.S. at 168. Such "accountability . . . is diminished" when "elected state officials cannot regulate in accordance with the views of the local electorate." *Id.* at 168, 169. "Preserving our federal system . . . ensures that the essential choices can be made by a government more proximate to the people than the vast apparatus of federal power." *Davis* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 684-85 (1999) (Kennedy, J., dissenting).

The history of the ACA's implementation vividly illustrates this dynamic. The "vast apparatus of federal power," *id.* at 685, such as HHS and IRS, has been largely unresponsive to the persistent public opposition to the ACA. By contrast, state officials and state democratic processes, who are "more proximate to the people," *id.* at 684, have been sensitive to public opinion, resulting in a variety of state responses to the establishment of state exchanges. Petitioners' interpretation of the ACA not only maintains fidelity to the text of the statute, but also promotes democratic accountability at the state level.

3. As written, the ACA fosters democratic participation by ordinary citizens in state political processes.

Third, Petitioners' interpretation of the ACA recognizes Congress's decision to involve the States in the Act's implementation. This design permits the voices of ordinary citizens to influence the implementation of federal policy, which encourages political participation and instructs citizens on the political process—core values of Our Federalism: "In addition to promoting experimentation, federalism enhances the opportunity of all citizens to participate in representative government." *FERC* v. *Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J., concurring in part and dissenting in part). "If we want to preserve the ability of citizens to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer, their local problems." *Id.*

The plain terms of the ACA allow the citizens to "retain the power to govern, not merely administer, their local problems" relating to health-insurance regulation. *Id.* The statute thus advances federalism's interests in promoting "participat[ion] in representative government" and permitting "citizens to learn democratic processes." *Id.*

Perhaps the most striking example of the ACA's promotion of democratic participation is Missouri's voter referendum on whether to permit its Governor to create a state exchange. This Court frequently

has acknowledged the value and effectiveness of such democratic deliberation in resolving difficult issues. *See Schuette*, 134 S. Ct. at 1636-38. Direct democracy includes "the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process." *Id.* at 1637. In this case, the Government "insist[s] that a difficult question of public policy," *i.e.*, whether to create a subsidized exchange, "must be taken from the reach of the voters" of Missouri, "and thus removed from the realm of public discussion, dialogue, and debate in an election campaign," to be conferred on the federal bureaucracy instead. *Id.* at 1637. This Court should not "rule that the question addressed by [Missouri] voters is too sensitive or complex to be within the grasp of the electorate; or that the policies at issue remain too delicate to be resolved save by [federal bureaucracies], acting at some remove from immediate public scrutiny and control . . . ." *Id.*

4. Enforcing the ACA as written will preserve the democratic choices resulting from informed state consideration of the exchanges.

Fourth, Petitioners' interpretation has the merit of preserving actual democratic choices achieved through the States' political processes, which the Government's revisionist view would effectively nullify. This Court has frequently emphasized that federal spending programs function properly only "when a State has a legitimate choice whether to accept the federal conditions in exchange for federal

funds." *NFIB*, 132 S. Ct. at 2602-03; *see also id.* at 2608 ("Congress may offer the States grants and require the States to comply with the accompanying conditions, but the States must have a genuine choice whether to accept the offer."). "[B]y any . . . permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply." *New York*, 505 U.S. at 168. "If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant." *Id.*

In this case, the ACA presented each State with a stark choice: set up an exchange, or face the loss of tax subsidies by its citizens. Many States confronted this choice and knowingly elected to forego the state exchange with its attendant benefits. This Court should respect these democratic choices, not nullify them. "The Federal Government is free, within its vast legislative authority, to impose federal standards [in cooperative-federalism programs]. For States to have a role, however, their own governing processes must be respected." *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 513 (Kennedy, J., dissenting).

The last time this Court considered the ACA, a plurality of the Court remarked: "In the typical case [of federal spending legislation] we look to the States to defend their prerogatives by adopting 'the simple expedient of not yielding' to federal blandishments when they do not want to embrace the federal policies as their own. The States are separate and independent sovereigns. Sometimes they have to act

like it." *NFIB*, 132 S. Ct. at 2603 (opinion of Roberts, C.J.) (internal citation omitted) (quoting *Mellon*, 262 U.S. at 482). Here, the States have "act[ed] like it." *Id.* They have "adopt[ed] the simple expedient of not yielding to federal blandishments when they do not want to embrace the federal policies as their own." *Id.* (quotation omitted). On the Government's view, these decisions were illusory. This Court should decline to adopt such a startlingly reductionist view.

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There is nothing "inconceivable" or "unfathomable" about the fact that the ACA deploys tax subsidies as an incentive for States to set up state-based exchanges. Threatening to deny benefits to state citizens in order to ensure States' participation in federal programs is an entirely familiar tactic of federal social-welfare legislation. In the ACA, Congress offered the States a choice: set up a healthcare exchange and receive major subsidies, or do not establish one and forego the money. The States took Congress at its word. They deliberated and crafted a variety of different political responses. This Court should interpret the Act according to its plain terms to give full effect to these state political outcomes. Enforcing the plain terms of the statute will best preserve this Court's role as faithful interpreter of federal legislation, Congress's supremacy in legislative matters, and the States' authority as independent sovereigns in our system of federalism.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court reverse the judgment of the court below.

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